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12  
13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN JOSE DIVISION

16  
17 PACIFIC NEWS SERVICE,

18 Plaintiff,

19 v.

20 JAMES E. TILTON, Acting Secretary of the  
California Department of Corrections and  
21 Rehabilitation; ROBERT L. AYERS, Acting  
Warden for the California State Prison at San  
22 Quentin,

23 Defendants.

Case No. C 06 1793 JF RS

**PLAINTIFF PACIFIC NEWS SERVICE'S  
OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS COMPLAINT**

Dept: Courtroom 3, 5th Floor  
Date: July 19, 2006  
Time: 1:30 p.m.  
Judge: Hon. Jeremy Fogel

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## I. INTRODUCTION

Defendants' motion to dismiss must be denied under the controlling authority of *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002) ("*CFAC II*"), *modifying in part*, 150 F.3d 976 (9th Cir. 1998) ("*CFAC I*") (collectively, "*CFAC*"). The principles enunciated by the Ninth Circuit in *CFAC* are directly applicable to the factual allegations of this Complaint and are dispositive of this motion.

In *CFAC*, plaintiff media organizations challenged San Quentin prison's practice of closing a curtain in front of the execution chamber during certain portions of the prison's lethal injection executions. The curtain prevented members of the media and the press from viewing critical aspects of the execution process. San Quentin officials claimed they needed the curtain to protect the anonymity of the prison staff, and therefore, to ensure the execution could proceed smoothly. The lawsuit sought to vindicate the media's First Amendment right of access to important public proceedings, a right that was first recognized in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). That right is central to our system of self-government because "valuable public debate—as well as other civic behavior—must be informed." *Id.* at 587 (Brennan, J., concurring).

The Ninth Circuit's ruling upheld the media plaintiffs' claim of a First Amendment right of access. It held that they had standing because the curtain inhibited their reporting on the execution. The court also held that the First Amendment right of access attaches to executions, because executions are historically open and because the information that can be gleaned from observing executions—particularly whether the inmate experiences pain—is crucial to informing the public debate on the death penalty. And it held that the socially valuable information to be gleaned from opening the curtain outweighed the prison's asserted interest in anonymity, particularly because the execution team could take less restrictive action to achieve their stated goal, by wearing masks.

The claim raised here is nearly identical to the claim in *CFAC*. Plaintiff Pacific News Service is a media organization that reports on executions. Instead of a physical curtain, PNS complains of a chemical curtain. PNS alleges that San Quentin's practice of paralyzing inmates

1 while it is executing them suppresses the same socially important information that was at issue in  
2 *CFAC*: whether or not the inmate is experiencing pain during the execution. San Quentin  
3 officials create this chemical curtain by administering to the inmate pancuronium bromide, a  
4 paralytic agent, which does not contribute to or hasten the inmate's death. Because it paralyzes  
5 the inmate, pancuronium bromide prevents witnesses from discerning whether or not the inmate  
6 is experiencing pain. Prison officials simply inject a curtain into the inmate.

7       The legal analysis is the same as it was in *CFAC*. PNS has standing because it reports on  
8 executions, and San Quentin's practice of paralyzing inmates during the execution inhibits that  
9 reporting. And *CFAC* has already held that the First Amendment right of access attaches to  
10 executions. Finally, here, as in *CFAC*, the First Amendment interest in observing important  
11 information outweighs the government interest in suppressing that information. Indeed, this is  
12 an even clearer case than *CFAC*. Although San Quentin officials asserted an ostensibly rational  
13 interest in execution team anonymity in *CFAC*, they have no reason to paralyze inmates while  
14 executing them, other than the illegitimate purpose of creating the appearance that executions are  
15 more peaceful and painless than they actually may be.

16       In their motion to dismiss, Defendants manufacture a distinction between the media  
17 "observing" an execution and the media "controlling" an execution. Their strategy is clear: they  
18 need some way to distinguish the physical curtain in *CFAC* from the chemical curtain at issue  
19 here. But the distinction they've come up with is incoherent. Every successful assertion of a  
20 constitutional right "controls" what the government does in *some* way. For instance, the *CFAC*  
21 plaintiffs "controlled" executions by forcing California to remove its curtain. Moreover,  
22 Defendants' distinction ignores that PNS is not even seeking to control an *execution*. Paralyzing  
23 inmates has nothing to do with executing them: the paralytic drug serves no purpose in the  
24 execution process. In fact, Defendants are perfectly able to execute inmates without paralyzing  
25 them, just as they are able to execute inmates without closing a curtain.

26       Defendants try to cast this distinction between "observing" and "controlling" both as a  
27 standing argument and as an argument rooted in the First Amendment right of access case law.  
28 No standing case or First Amendment right of access case makes this distinction.

1 Thus, Defendants' motion to dismiss must be denied.

2 **II. FACTS**

3 As explained below, for both the Rule 12(b)(1) and Rule 12(b)(6) aspects of the motion  
4 to dismiss, the factual allegations of the Complaint must be taken as true. Defendants have not  
5 submitted any declarations or other evidence in support of their motion to dismiss. Thus, the  
6 following facts are the only ones before the Court:

7 Plaintiff PNS is a media organization that reports on California executions. Compl., ¶ 4.  
8 PNS is interested in disseminating information on what eyewitnesses to California executions  
9 observe during the lethal injection process. *Id.* Defendants James Tilton and Robert Ayers are  
10 the respective heads of the California Department of Corrections and Rehabilitation ("CDCR")  
11 and the San Quentin prison, which is within CDCR. *Id.*, ¶¶ 5 & 6. These institutions administer  
12 every California execution. *Id.*, ¶ 8.

13 Executions by lethal injection are performed pursuant to San Quentin Operational  
14 Procedure No. 770 ("Procedure 770"). *Id.*, ¶ 10. Members of the press and the public view these  
15 executions. *Id.*, ¶ . Procedure 770 involves the injection of three drugs, in order: sodium  
16 pentothal, pancuronium bromide, and potassium chloride. *Id.*, ¶ 11. Sodium pentothal is  
17 intended to anesthetize the inmate so that he is unable to feel pain. *Id.*, ¶ 12. Pancuronium  
18 bromide paralyzes all of the inmate's voluntary muscles. *Id.*, ¶ 11. It therefore prevents the  
19 inmate from moving, speaking, or communicating in any manner. *Id.*, ¶ 17. Potassium chloride  
20 stops the inmate's heart. *Id.*, ¶ 11.

21 There is a serious question as to whether Defendants are properly administering sodium  
22 pentothal during lethal injection executions. *Id.*, ¶ 16. If they are improperly administering  
23 sodium pentothal, the inmate would experience intolerable and unnecessary pain when the other  
24 two drugs are administered. *Id.* However, because Defendants administer pancuronium  
25 bromide, the press and public witnesses observing the execution will never know whether the  
26 inmate is experiencing this intolerable and unnecessary pain while dying. *Id.*, ¶ 17. There is  
27 potentially other socially valuable information, unrelated to pain, that pancuronium bromide is  
28 also suppressing. *Id.*, ¶ 19-20.

Pancuronium bromide is therefore a chemical curtain. *Id.*, ¶ 1. It prevents execution witnesses from seeing what is really happening during an execution. *Id.*, ¶¶ 17-20. Pancuronium bromide serves no legitimate functional or penological purpose during an execution, such as anesthetizing the inmate or hastening his death. *Id.*, ¶ 21. Defendants know this, but nonetheless continue to use pancuronium bromide. *Id.* Therefore, Defendants *intentionally* use pancuronium bromide to conceal socially important information from the press and the public. *Id.*, ¶ 22.

### III. ARGUMENT

#### A. PNS has standing to pursue its First Amendment claim.

PNS has standing for the same reason that the *CFAC* plaintiffs had standing: a media organization that reports on governmental proceedings has standing to challenge restrictions that impede their ability to report on those proceedings. Defendants cite no contrary authority. Indeed, close scrutiny of Defendants' standing argument reveals that they are not really making a standing argument at all. Rather, their challenge is to the merits of PNS's claim.

##### 1. When analyzing this Rule 12(b)(1) motion, the allegations in the Complaint are taken as true.

When analyzing standing, the Court must take the allegations in PNS's Complaint as true. This is because Defendants have neither challenged the *factual* allegations in the PNS Complaint nor submitted any declarations in support of their 12(b)(1) motion. Consequently, there will be no evidentiary hearing. *See McLachlan v. Bell*, 261 F.3d 908, 909 & n.2 (9th Cir. 2001) (holding that factual allegations in the complaint are accepted as true if the court is not called upon to hold an evidentiary hearing); *see also Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176-77 (3d Cir. 2000) (*citing Mortensen v. First Federal Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) ("At the outset, we must emphasize a crucial distinction, often overlooked, between 12(b)(1) motions that attack the complaint on its face and 12(b)(1) motions that attack the existence of subject matter jurisdiction in fact, quite apart from any pleadings. The facial attack does offer similar [Rule 12(b)(6)] safeguards to the plaintiff: the court must consider the allegations of the complaint as true.")).

1 Thus, Defendants' argument that "Plaintiff's allegations are not presumed to be true" is  
 2 simply wrong. Indeed, all four cases cited by Defendants recognize the distinction that PNS  
 3 raises between those Rule 12(b)(1) motions where the defendant challenges the factual  
 4 allegations of the complaint by submitting competent evidence and those Rule 12(b)(1) motions  
 5 where the complaint's factual allegations go unchallenged. *See* Mot. to Dismiss Compl. at 3;  
 6 *Frasure v. United States*, 256 F. Supp. 2d 1180, 1184 (D. Nev. 2003); *Anderson v. United States*,  
 7 245 F. Supp. 2d 1217, 2020 (M.D. Fla. 2002); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322  
 8 F.3d 942, 946 (7th Cir. 2003); *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553,  
 9 1558-59 (9th Cir. 1987).

10 PNS may rest on its Complaint and need not submit evidence to establish standing.

11 **2. The Ninth Circuit's *CFAC I* opinion mandates a finding that PNS has**  
 12 **standing.**

13 To establish Article III standing, PNS must demonstrate that: (1) it will suffer an "injury-  
 14 in-fact"; (2) "the injury is fairly traceable to the challenged action"; and (3) "it is likely, as  
 15 opposed to merely speculative, that the injury will be redressed by a favorable decision." *Wilbur*  
 16 *v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005) (citing *Friends of Earth, Inc. v. Laidlaw Envtl.*  
 17 *Servs., Inc.*, 528 U.S. 167, 180-81 (2000)). As a shorthand, these requirements are labeled  
 18 "injury in fact," "causation," and "redressability." *Vt. Agency of Natural Res. v. United States ex*  
 19 *rel. Stevens*, 529 U.S. 765, 771 (2000).

20 In *CFAC I*, the Ninth Circuit held that media organizations that report on executions have  
 21 standing to challenge alleged violations of the First Amendment right to witness executions.

22 This holding was never revisited in *CFAC II*. *CFAC I* reasoned:

23 [Plaintiffs] have covered or observed executions in the past and are likely to do so  
 24 in the future. The restrictive procedures of which [Plaintiffs] complain[] could  
 25 hinder its members' ability to do their work and would cause an injury in fact to  
 26 them. In particular, [Plaintiff] could be stifled in reporting to the public about  
 27 how executions were being carried out.

28 *CFAC I*, 150 F.3d at 980-81. This analysis regarding injury-in-fact and causation applies equally  
 to PNS's claim in this case. PNS has "covered or observed executions in the past and is likely to  
 do so in the future." *Id.*; *see* Complaint, ¶ 4 (alleging that PNS "reports on, among other things,

the application of the death penalty in California”). Defendants do not contest this. In addition, “the restrictive procedures of which [PNS] complains”—namely the use of pancuronium bromide—could hinder its members’ ability to “report[] to the public about how executions were being carried out.” *CFAC I*, 150 F.3d at 980-81; *see* Complaint ¶¶ 18-20 (describing information important to the public that is concealed by pancuronium bromide). Defendants do not contest this point either. Thus, PNS satisfies the injury-in-fact and causation requirements.

Although *CFAC I* did not expressly address the third standing requirement, redressability, it was not seriously in dispute there or here. In *CFAC I*, enjoining the state from drawing the curtain would reveal to execution witnesses reportable information concerning the “initial procedures,” thereby redressing the *CFAC* plaintiffs’ concerns. Similarly, the injunction sought here would prohibit San Quentin officials from suppressing important information about the execution process.

Thus, *CFAC I*, which Defendants never cite, answers the standing question in PNS’ favor.

### 3. Defendants confuse the concept of standing with the merits-level inquiry of whether PNS states a valid First Amendment claim.

Ultimately, Defendants do not raise any actual *standing* arguments because they have fundamentally confused the concept of standing with the merits of PNS’s First Amendment challenge. It goes without saying that the question of standing is separate from and independent of the question of whether a plaintiff states a valid claim on the merits. For instance, in *CFAC I* itself, the Ninth Circuit held that the plaintiffs had standing, despite holding that the plaintiffs would not necessarily prevail on the merits. 150 F.3d at 980 n.8; *see also* *Flynt v. Rumsfeld*, 355 F.3d 697, 699 & 702-03 (D.C. Cir. 2004) (holding that although reporters have *standing* to challenge a military regulation that prevents them from “accompany[ing] ground troops on combat missions” in Afghanistan, the regulation does not violate the First Amendment).

Defendants’ motion evidences their confusion between the concept of standing and the merits-level inquiry. Defendants correctly recite the three Article III standing requirements in Section A of their standing argument. *See* Mot. to Dismiss Compl. at 2-3. But, Section B of

1 their standing argument—where they purport to apply the law of standing to this case—only  
 2 makes merits-level arguments. Indeed, Section B’s heading reads: “Because Plaintiff Has No  
 3 Legally Protected Interest In The Means By Which An Execution Is Conducted The Court Lacks  
 4 Jurisdiction To Hear The Case.” *Id.* at 3. In essence, Defendants argue that because PNS has no  
 5 First Amendment right, PNS lacks standing. Moreover, of the nine cases cited in Section B of  
 6 Defendants’ standing argument, eight contain no discussion of standing at all. They simply  
 7 pertain to the *merits* of the constitutional rights at issue in those cases. *Id.* at 3-5. The ninth case,  
 8 *Flynt v. Rumsfeld*, actually held that the plaintiffs there *did* have standing. 355 F.3d at 702.  
 9 Even still, the only portion of *Flynt* that Defendants cite to pertains to *Flynt*’s holding on the  
 10 merits. See Mot. to Dismiss Compl. at 5; *Flynt*, 355 F.3d at 703.

11 Thus, Defendants do not make a standing argument at all. Rather, they only attack the  
 12 Complaint on the merits, to which PNS now turns.

13 **B. The PNS Complaint states a claim for which relief may be granted.**

14 There is no dispute that when analyzing the merits of PNS’ First Amendment claim, the  
 15 Court must accept the factual allegations in the Complaint as true. *Hearns v. Terhune*, 413 F.3d  
 16 1036, 1040 (9th Cir. 2005). Thus, the Court must take as true PNS’ allegations that  
 17 “pancuronium bromide serves no legitimate functional or penological purpose in the lethal  
 18 injection protocol,” and that Defendants “intentionally administer pancuronium bromide to  
 19 conceal important information from the press and the public.” *Id.*, ¶¶ 21, 22. It is with these  
 20 serious allegation in mind that the Court should approach the relevant First Amendment case  
 21 law.

22 **1. PNS states a meritorious claim for violation of its First Amendment right of**  
 23 **access.**

24 This case involves the application of the First Amendment right to attend and witness  
 25 important public proceedings in the context of an execution. That right was established in  
 26 *Richmond Newspapers*, 448 U.S. 555. This presumptive right of access to government  
 27 proceedings now attaches to virtually every phase of the criminal and civil justice process,<sup>1</sup> to

28 <sup>1</sup> See, e.g., *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (“*Press-Enterprise I*”)

executive proceedings,<sup>2</sup> and to executions inside prisons.<sup>3</sup> The primary purpose of this First Amendment access right is “[t]o ensure that [the] constitutionally protected ‘discussion of government affairs’ is an informed one.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982).

Courts employ a two-step analysis to determine whether a restriction on access to a particular government proceeding violates the First Amendment. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9-10 (1986) (“*Press-Enterprise II*”). First, the First Amendment right of access must attach to the proceeding. *Id.* Second, if the First Amendment access right does attach, the restriction must survive a First Amendment balancing test: the legitimate governmental interests it serves must outweigh the loss of First Amendment values. *Id.* Thus, even where the First Amendment right of access attaches to a proceeding, it is qualified, not absolute. *Id.*

To state a claim under the First Amendment for violation of the right of access, the Complaint’s allegations must establish (1) that the First Amendment right of access attaches to executions, and (2) that the state’s practice of paralyzing death row inmates fails the appropriate First Amendment balancing test. The Complaint satisfies both prongs of this test. The first prong is directly controlled and established by *CFAC II*, a decision that binds this Court. The second prong is clearly satisfied, given the allegations that pancuronium bromide serves no legitimate purpose during an execution and that the state intentionally paralyzes inmates in order to conceal socially important information from the public and press.

(voir dire proceedings); *Press-Enterprise II*, 478 U.S. 1 (preliminary hearings in criminal prosecution); *Oregonian Publ’g Co. v. United States District Court*, 920 F.2d 1462 (9th Cir. 1990) (plea agreements); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16 (2d Cir. 1984) (civil trials).

<sup>2</sup> See, e.g., *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 616 F. Supp. 569 (D. Utah 1985) (formal agency hearings); *Cable News Network, Inc. v. Am. Broad. Cos.*, 518 F. Supp. 1238 (N.D. Ga. 1981) (White House events).

<sup>3</sup> *CFAC II*, 299 F.3d at 877; *KQED, Inc. v. Vasquez*, 18 Media L. Rep. 2323 (N.D. Cal. 1991). See also *Oregon Newspaper Publishers Assn. v. Oregon*, 988 P.2d 359 (Or. 1999) (vindicating analogous public right to meaningfully witness executions based on state statute).

1                   a.       ***CFAC II* has already decided as a matter of law that the qualified**  
2                               **First Amendment access right attaches to executions.**

3               *CFAC II* held that the press and the public have a right to meaningfully observe  
4 executions “from the moment the condemned enters the execution chamber through, to and  
5 including, the time the condemned is declared dead.” *CFAC II*, 299 F.3d at 885-86 (citations  
6 omitted). Defendants concede this. Mot. to Dismiss Compl. at 3. This holding, on its face,  
7 satisfies the first step of the two-step analysis performed in First Amendment right-of-access  
8 cases.

9               Importantly, *CFAC II*’s reasons for extending the First Amendment right of access to  
10 executions are particularly relevant in the context of PNS’s claim. *CFAC II*’s holding rested on  
11 three considerations:

- 12               1.       the developing body of case law recognizing the First Amendment right of access  
13                       to most aspects of the criminal justice system, including trials, pre- and post-trial  
14                       proceedings, and prisons;
- 15               2.       the historical tradition of public access to executions, from Twelfth century  
16                       England to the modern American practice; and
- 17               3.       the functional importance of public access to executions, namely its contribution  
18                       to public dialogue on the humaneness of the death penalty and the appearance of  
19                       fairness that public access fosters.

20       *CFAC II*, 299 F.3d at 874-77.

21       The primary type of information to which PNS seeks access is the indicia of pain that an  
22 inmate manifests during the *killing* process (not merely indicia of pain during the “initial  
23 procedures,” which were at issue in *CFAC*). This is precisely the type of information in which  
24 there is historical and functional interest. As the District Court stated in *CFAC*:

25       Courts evaluating the constitutionality of methods of execution rely in part on  
26 eyewitness testimony. See, e.g., *Jones v. Butterworth*, 695 So. 2d 679 (Fla. 1997);  
27 *Sims v. Florida*, 2000 WL 193226 at \*7-8 (Fla. 2000); *Fierro v. Gomez*, 865 F.  
28 Supp. 1387 (N.D. Cal. 1994). This eyewitness testimony is crucial to the review  
of execution protocols which the courts frequently undertake. While courts rarely  
invalidate a state’s execution procedure, ongoing challenges and threats of  
challenge motivate states to modify their procedures. For example, lethal gas and  
electrocution have been vigorously challenged in recent years. In response to  
these challenges, most states have either moved to the use of lethal injection or  
make it available as an alternative to gas, electrocution or hanging. See, e.g.,  
*Bryan v. Moore*, 120 S. Ct. 1003 (2000) (certiorari to determine constitutionality  
of electrocution dismissed as improvident after state modified statute to permit  
execution by lethal injection); *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996)

1 (constitutionality of hanging a 400-pound man rendered moot after state modified  
2 statute to permit lethal injection).

3 *CFAC*, 2000 WL 33173913 at \*9 (N.D. Cal. 2000), *aff'd*, 299 F.3d 868 (9th Cir. 2002).

4 This Court should heed both the holding and reasoning in *CFAC* when evaluating  
5 Defendants' motion to dismiss. Defendants consistently mischaracterize PNS's Complaint as an  
6 effort by a news organization to satisfy its predictable preference for more information, as if PNS  
7 merely seeks information of trivial importance. Defendants claim that PNS seeks greater access  
8 to executions because "such access might lead to more thorough or better reporting" (Mot. to  
9 Dismiss Compl. at 5, lns 4-5), because PNS seeks an "execution comporting more closely with  
10 its preferences" (Mot. to Dismiss Compl. at 6, lns 7-8), or because PNS's ability to report "would  
11 be enhanced by access to particular information or locations" (Mot. to Dismiss Compl. at 6, lns  
12 7-8). This is simply not true. Through this lawsuit, PNS seeks access to precisely the type of  
13 *important* information that motivated the *CFAC* court to recognize the right of access to  
14 executions in the first place: information about pain that the inmate may experience as a result of  
15 the execution process. Thus, the importance of the type of information PNS seeks is a key  
16 consideration.

17 **b. Defendants' alleged intentional use of pancuronium bromide to**  
18 **conceal important information from the public cannot survive the**  
19 **First Amendment balancing test.**

20 Given that the First Amendment access right attaches to executions, the only remaining  
21 question is whether the particular challenged restriction survives First Amendment scrutiny. The  
22 restriction at issue here is San Quentin's use of pancuronium bromide to paralyze the inmate's  
23 body so as to conceal from the public possible manifestations of pain or other important  
24 information.

25 In the prison context, courts typically use the four-factor balancing test of *Turner v.*  
26 *Safley*, 482 U.S. 78 (1987), to evaluate whether an asserted constitutional right outweighs the  
27 legitimate penological interests of the prison. *See CFAC II*, 299 F.3d at 877-79<sup>4</sup>; *Walker v.*

28 <sup>4</sup> The *CFAC II* court had serious doubts about employing the deferential *Turner* standard because  
the challenged restriction—the drawing of the curtain—actually infringed the rights of non-  
prisoners. 299 F.3d at 878-79. Nonetheless, *CFAC II* persisted with the *Turner* test because

1 *Sumner*, 917 F.2d 382, 385-86 (9th Cir. 1990); *Whitmire v. Arizona*, 298 F.3d 1134, 1136 (9th  
 2 Cir. 2002). Courts use the *Turner* test because it is deferential to prison officials, who face  
 3 “complex and intractable” problems of prison administration that are not easily resolved by  
 4 judicial decree. *CFAC II*, 299 F.3d at 877-78 (quoting *Procunier v. Martinez*, 416 U.S. 396,  
 5 404-05 (1974)). The *Turner* test itself lays out those “legitimate policies and goals of the  
 6 corrections system” that fall within the special province or expertise of prison officials:  
 7 “deterrence of future crime, protection of society by quarantining criminal offenders,  
 8 rehabilitation of those offenders and preservation of internal security.” *Id.* at 878 (citing *Pell v.*  
 9 *Procunier*, 417 U.S. 817, 822-23 (1974)).

10 With those “legitimate penological objectives” defined, the *Turner* test states: “in  
 11 reviewing a challenge to a prison regulation that burdens fundamental rights, [courts] are  
 12 directed to ask whether the regulation is reasonably related to legitimate penological objectives,  
 13 or whether it represents an exaggerated response to those concerns.” *Id.* (internal quotations  
 14 omitted) (quoting *Turner*, 482 U.S. at 87). More specifically:

15 In determining whether a restriction on the exercise of rights is reasonable or  
 16 exaggerated in light of those penological interests, four factors are relevant: (1)  
 17 whether there is a valid, rational connection between the prison regulation and the  
 18 legitimate governmental interest put forward to justify it; (2) whether there are  
 19 alternative means of exercising the right that remain open to prison inmates; (3)  
 20 what impact accommodation of the asserted constitutional rights will have on  
 21 guards and other inmates, and on the allocation of prison resources generally and  
 22 (4) whether there exist ready alternatives that fully accommodate the prisoner’s  
 23 rights at *de minimis* cost to valid penological interests.

24 *Id.* (internal quotations omitted) (quoting *Turner*, 482 U.S. at 89-91).

25 Two important observations should be made about the first prong of the *Turner v. Safley*  
 26 test. First, if the government has an illegitimate purpose of concealing information from the  
 27 public, it automatically fails the balancing test. *CFAC II*, 299 F.3d at 880. Second, if there is no  
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25 *CFAC I* had done so, and the subsequent panel found itself bound by *CFAC I*. *Id.* at 879.  
 26 Because Defendants cannot prevail even under the *Turner* standard, it is immaterial to the  
 27 outcome of this motion whether a less deferential balancing test should apply.

28 Additionally, *CFAC II* actually applied a stricter version of the *Turner* test, requiring slightly  
 greater scrutiny of government conduct. 299 F.3d at 879-80 (requiring a “closer fit”). Again,  
 because this heightened standard is immaterial to the outcome of the balancing test in this  
 motion, PNS omits further discussion of it here.

1 “legitimate governmental interest” that justifies the restriction on fundamental rights, there is no  
 2 need for further analysis because there is nothing against which to weigh the infringement of the  
 3 plaintiff’s rights. *Id.* at 883 (“the first factor is arguably dispositive.”); *see also Walker*, 917 F.2d  
 4 at 385 (“The first of these factors constitutes a *sine qua non*.”).

5 Defendants’ practice of paralyzing inmates during executions clearly fails this test, for  
 6 two independent reasons. First, PNS has alleged that Defendants *intentionally* paralyze inmates  
 7 to conceal information from the public. Second, PNS has alleged that there is no legitimate  
 8 government interest in using pancuronium bromide. Thus, for purposes of this motion, there is  
 9 no interest to weigh against the loss of PNS’s First Amendment access rights. This case is  
 10 therefore even easier than the numerous cases where courts refused to dismiss the complaint at  
 11 the pleadings stage, even where the government was able to assert a plausible penological  
 12 interest to justify its conduct. *See, e.g., Hydrick v. Hunter*, No. 03-56712, 2006 WL 1493100, at  
 13 \*9-\*10 (9th Cir. June 1, 2006) (pending publication in the Federal Reporter); *Whitmire*, 298 F.3d  
 14 1134 (scrutinizing the prison’s asserted justification for the challenged policy); *Walker*, 917 F.2d  
 15 at 385-86. In these cases, the Ninth Circuit refused to weigh the government’s asserted  
 16 penological interests against the asserted right at the pleadings stage to justify dismissing the  
 17 complaint. Here, Defendants do not even attempt to assert an interest in paralyzing inmates  
 18 while executing them. *See Mot. to Dismiss Compl.* at 4-5 (“Putting to one side whether Plaintiff  
 19 correctly understands the effects of pancuronium and the reasons it is used by the state, the  
 20 ‘right’ Plaintiff claims for itself is not provided by the First Amendment.”). Thus, any balancing  
 21 that is performed to decide this motion must be resolved in PNS’s favor.

22 Yet, Defendants somehow appear to have missed that a First Amendment balancing test  
 23 exists. Defendants argue that “the First Amendment does not guarantee unfettered access to  
 24 places, events, or information.” *See id.* at 7; *see also id.* at 4-5. They then cite numerous cases  
 25 where the plaintiff raising a First Amendment right of access lost. *Id.* at 7. The only principle  
 26 that can be gleaned from this analysis is that the plaintiff always loses, and the government  
 27 always wins. Of course, PNS recognizes that the First Amendment right of access is not  
 28 “unfettered.” This is why there is a balancing test. Nowhere in their 9-page brief, however, do

1 Defendants even mention a balancing test. Nor do Defendants cite the numerous Supreme Court  
 2 cases in which the plaintiff raising a First Amendment right of access claim prevailed. *See, e.g.,*  
 3 *supra* footnotes 1-3.

4 This failure to recognize that a balancing test exists explains the central fallacy in  
 5 Defendants' brief. Defendants appear to believe that there is a bright-line distinction between  
 6 "*observ[ing]*" an execution and "*defin[ing]* *how* the execution should be conducted." *See* Mot. to  
 7 Dismiss Compl. at 4. But this notion fundamentally contradicts the idea of a balancing test.  
 8 Whenever a plaintiff prevails under *Turner*, the court is necessarily, in some sense, telling the  
 9 government what to do. *Turner* applies whenever a prison official is alleged to have violated a  
 10 fundamental right, not just in the execution context. Thus, the balancing test was used in *CFAC*  
 11 to "define *how* the execution should be conducted" (i.e., without a curtain), and in *Turner* itself  
 12 to "define *how*" the prison operated. *Turner*, 482 U.S. at 94-99 (holding invalid a prison rule  
 13 requiring prior approval before inmates could marry). The *Turner* test already takes into  
 14 consideration the deference owed to prisons, but nonetheless countenances courts striking down  
 15 prison rules when they unjustifiably violate fundamental rights. Thus, the bright-line distinction  
 16 Defendants seek to draw between "*observ[ing]*" an execution and "*defin[ing]* *how* the execution  
 17 should be conducted" simply does not exist.

18 **2. *Cohen v. Cowles Media* has no applicability to this case.**

19 Instead of addressing *Turner*, Defendants argue instead that the PNS Complaint should  
 20 be dismissed under the doctrine that neutral rules of general applicability "do not offend the First  
 21 Amendment simply because their enforcement against the press has incidental effects on its  
 22 ability to gather and report the news." Mot. to Dismiss Compl. at 8 (*quoting Cohen v. Cowles*  
 23 *Media Co.*, 501 U.S. 663, 669 (1991)). But this case is a far cry from *Cohen* and its line of cases.  
 24 *See also Turner Broad. Sys., Inc. v. Fed. Commc'n's Comm'n*, 512 U.S. 622, 640-41 (1994).

25 In *Cohen*, a confidential source sued reporters who broke their promise of confidentiality.  
 26 The reporters invoked the First Amendment as a defense. They argued that they could not be  
 27 held liable on a promissory estoppel theory under Minnesota law, because that would effectively  
 28 punish them for reporting important news. The Supreme Court rejected the reporters' argument.

1 The Court held that there was no basis for heightened First Amendment scrutiny because the  
2 state law of promissory estoppel, which “simply requires those making promises to keep them,”  
3 was (1) neutral toward First Amendment conduct and (2) generally applicable to all citizens, not  
4 just members of the press. *Cohen*, 501 U.S. at 669-72.

5 But paralyzing inmates during an execution is not neutral toward First Amendment  
6 conduct—that is, it necessarily inhibits the ability of the press to gather information of public  
7 importance. In the very same way that the physical curtain in *CFAC* was not neutral towards the  
8 free flow of information to the public, this chemical curtain has the natural and direct effect of  
9 cutting off access to information. More so than a curtain, paralysis serves no legitimate purpose  
10 during an execution. Additionally, PNS has alleged that Defendants *intentionally* paralyze  
11 inmates to conceal information. Thus, there is no way in which Defendants’ use of pancuronium  
12 bromide can be seen as neutral to First Amendment conduct.

13 Perhaps more importantly, paralysis of inmates is not a generally applicable rule.  
14 Procedure 770 does not call for the paralysis of all inmates at San Quentin; only the ones who are  
15 being executed receive pancuronium bromide. San Quentin’s practice of paralyzing inmates  
16 during executions is not like Minnesota’s generally applicable rule of promissory estoppel,  
17 which is only occasionally applied to First Amendment conduct. Rather, pancuronium bromide  
18 inhibits public access to information *every time* it is used during an execution. This is not a case  
19 of the press or the public seeking a special exemption from a “rule” that is otherwise applied  
20 across-the-board; PNS challenges the “rule” in every instance it is applied.

21 The doctrine concerning neutral rules of general applicability has no relevance to PNS’s  
22 Complaint.

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**IV. CONCLUSION**

For the foregoing reasons, Defendants' motion to dismiss should be denied.

Dated: June 20, 2006

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